

The False Claims Act: Litigating Scientific Misconduct II

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On January 22, 1997, the U.S. Court of Appeals for the Fourth Circuit reversed the U.S. District Court decision in *U.S. ex rel. Pamela A. Berge v. The Board of Regents of the University of Alabama et al.*¹ As discussed in a prior "Public Health and the Law" column (1995;110:784-9), the trial court had earlier found that the University of Alabama and its researchers violated the False Claims Act by failing to credit or accurately report, in grant applications to the National Institutes of Health (NIH), work done by Dr. Pamela Berge, a former graduate student who had conducted research at the university. The False Claims Act provides that any person who knowingly presents a false claim for payment to the United States, uses a false record or statement to get a claim paid, or conspires to defraud the Government to get a claim paid may be held accountable for up to three times the amount lost by the Government plus civil penalties.² A False Claims Act case may be brought by the Government or, as in this case, by a private citizen on behalf of the Government.

At trial, Dr. Berge argued that the University of Alabama and its researchers violated the False Claims Act by: (a) misrepresenting to NIH the amount of data they had computerized under the grant, (b) including an abstract of Dr. Berge's work in a grant progress report without acknowledgment, (c) failing to fully disclose Dr. Berge's research results, and (d) describing work that Dr. Karen Fowler, another graduate stu-

dent, had plagiarized from Dr. Berge. The jury agreed, awarding a total of \$1.66 million plus civil penalties to the United States and Dr. Berge, of which 30% was to be paid to Dr. Berge. The jury also awarded \$265,000 to Dr. Berge based on its finding that university researchers violated Alabama state law by stealing Dr. Berge's intellectual property.

The appeals court concluded that Dr. Berge failed to show that the statements she alleged as false were material to NIH's decision to fund the grant, or even that the statements were false. Specifically, the appeals court found that: (a) Dr. Berge's allegation that the university falsely represented the amount of data researchers had computerized was not material because collection, rather than computerization, of the data was the principal purpose of the project and the university had collected considerable data beyond that used by Dr. Berge; (b) omission of Dr. Berge's name from an abstract in a progress report to NIH was not material because NIH did not require her name to be included, and using the abstract without her permission was not a false statement because one of the principal investigators was a coauthor; (c) "submerging" Dr. Berge's work by failing to report implications of her research was not false as it was Dr. Berge's responsibility to report such implications, which may have only been discernable later; and (d) reporting on work done by Dr. Fowler was not false because Dr. Fowler did not plagiarize Dr. Berge's work. The appeals court also found that Dr. Berge's intellectual property was not stolen under Federal copyright law, which does not protect ideas and methods.

The appeals court also discredited arguments that False Claims Act cases against state institutions by individuals are unconstitutional. The appeals court concluded that, because the United States is the real party that has an

interest in a False Claims Act case whether or not it joins the case, the Constitutional amendment preventing individuals from suing states does not apply.³ Moreover, the Government's decision not to join the case is not proof that it has not suffered harm sufficient to sustain the case.

The appeals court's decision means that a complainant must show that statements alleged as false are material to the Government's decision to fund a grant to be actionable under the False Claims Act. While this decision makes it less likely that an institution or its researchers will be held accountable for the types of statements Dr. Berge alleged were false, such as failure to attribute a researcher's work, the court emphasized that the False Claims Act *does* apply to state institutions and their researchers and that they may be held liable under the Act for other types of statements. The appeals court thus confirmed the trial court's determination that the False Claims Act provides a mechanism for holding institutions and individuals accountable for scientific misconduct allegations that involve material false claims to the Government.

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References

1. Civ. Action No. N-93-158 (D. Md.), May 16, 1995.
2. False Claims Act. 31 U.S.C. §3729.
3. Compare *Seminole Tribe v. Florida*, 134 L. Ed. 2d 252 (1996).